(3)

No. 86-1605

In The

Supreme Court Of The United States

OCTOBER TERM, 1986

PATRICK ROGERS,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE STATE OF CONNECTICUT

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EDITOR'S NOTE:

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QUESTION PRESENTED

WHETHER THE CONNECTICUT APPELLATE COURT ERRED IN HOLDING THAT THE DEFENDANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY TESTIMONY CONCERNING THE DEFENDANT'S INVOCATION OF HIS MIRANDA RIGHTS TO TERMINATE HIS VOLUNTARY STATEMENT TO THE POLICE, WHERE THE TESTIMONY WAS MERELY A FACTUAL ACCOUNT OF THE SCOPE OF INTERROGATION AND WAS NOT UTILIZED AS EVIDENCE OF GUILT; AND IN HOLDING THAT THE PETITIONER HAD WAIVED THE CLAIM OF CONSTITUTIONAL ERROR

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STATUTES AND RULES INVOLVED

Rule 17.1, Revised Rules of the Supreme Court of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

OPINION BELOW

The opinion of the Connecticut Appellate Court (Pet. App. A) is reported at 9 Conn.App. 208 (1986). The Connecticut Supreme Court's denial of certification is reported at 201 Conn. 806 (1987).

STATEMENT OF THE CASE

The petitioner was tried by a jury on three counts of sexual assault in the first degree, one count of burglary in the first degree, and one count of unlawful restraint. The jury convicted him on one count of sexual assault in the first degree, and found him not guilty on all other counts. The petitioner was sentenced to six years imprisonment.

At the petitioner's trial the state called Lieutenant Graham as a witness to recount the circumstances under which petitioner was booked at the police station, was advised of his Miranda rights, and orally waived those rights. After the waiver, the petitioner then gave his version of the incident for

which he was arrested, indicating that he had engaged in consensual sexual relations with the victim until "she got upset". When asked if he had determined what the petitioner had meant by "she got upset", the police officer responded

> No, that was when the -- After he said that, he said, "I don't want to talk to you anymore. I want a lawyer."

Defense counsel did not object to this testimony, nor did he request a curative instruction by the court.

The prosecutor did not pursue or focus on the termination of the interview or the unexplained nature of the victim's upset state. Instead, he concentrated on the contents of the petitioner's responses to the interrogation. At the conclusion of this inquiry, the prosecutor asked, "Then you ended at his request?" Lieutenant

Graham responded, "Then he said he wanted a lawyer, the interview ended." No objection was interposed by defense counsel. No further reference to the petitioner's termination of the postarrest interview was made during the state's case-in-chief.

After the state rested, the petitioner testified in his own defense. During his direct testimony, the petitioner recounted his version of his sexual encounter with the victim, which he characterized as consensual. He also testified that the police obtained his statement by insisting that he talk to them, despite his unwillingness to do so and despite his request for counsel.

The prosecutor then cross-examined the petitioner about the circumstances of the postarrest interview and the

voluntariness of his custodial statement. Again, the petitioner testified that Lieutenant Graham had insisted that he talk, despite the fact that "I told him several times that I didn't want to talk to him" and " I told him I wanted to speak to my attorney." The following colloquy ensued:

[Prosecutor]: So, you had invoked the right, your rights, which you had a right to do, and he violated it [sic]?

[Petitioner]: More or less, yes.

* * *

[Prosecutor]: Isn't it true that after all of these questions were asked [by the police], you gave answers, you then said, "I don't want to answer any more questions, please contact my lawyer"?

[Petitioner]: I told them that through-

out the whole conversation.

Defense counsel made no objection to the foregoing cross-examination. After the defense had rested, the state called Lieutenant Graham in rebuttal:

* * * * *

[Prosecutor]: Would you indicate to the members of the jury the circumstances under which you concluded the interview [with the petitioner]?

[Lieutenant Graham]: Well, as I said before, the interview went on for fifteen or twenty minutes at the most. Some of the things, you know after he made [sic] some of the things that he said and I was asking him things, questions. And he said that he didn't want to answer any more questions, he wanted a lawyer. And that's when I stopped [the interview].

[Prosecutor]: Did you continue to ask him any other questions after he made that statement to you?

[Lieutenant Graham]: No, absolutely not.

Defense counsel raised no objection to this testimony, nor did he request a mistrial or a curative instruction.

On appeal to the Connecticut Appellate Court, the petitioner claimed that the prosecutor's questions and witnesses' responses violated his constitutional rights. The Appellate Court afforded review to this claim despite the petitioner's conceded failure to raise it at trial. (Pet. App. at 19a). The Appellate Court rejected the claim, noting that a prosecutor's reference to a defendant's invocation of his right to remain silent

"is not always constitutionally impermissible" where such evidence is presented to recount the sequence of events in the police investigation. (Pet. App. at 21a) The Appellate Court held:

> The witnesses' remarks elicited by the prosecution were merely factual accounts and narratives of the police interrogation of the defendant wherein and until the defendant asserted his right to remain silent and his right to counsel. There is no indication on the record that the prosecutor made any remarks which could reasonably be perceived as prejudicial to the defendant's rights. Likewise, there is no evidence in the record to support the defendant's claim that the evidence of his assertion of his rights was offered to demonstrate his guilt. Cf. Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976).
>
> We also note that the defense counsel questioned the defendant on direct examination about his assertion of

> the right to remain silent and the right of [sic] an attorney. This questioning indicates that the defendant's failure to object [during the state's case-in-chief] was not due to inadvertence, inattention or mistake, but was a tactical decision at trial. Any constitutional objection to its admission therefore, has been waived. See State v. Moye, [177 Conn. 487,] 499 [418 A.2d 870, vacated and remanded on other grounds, 444 U.S. 893 (1979)].

(Pet. App. A at 22a-23a). The Connecticut Supreme Court denied petitioner's petition for certiorari. State v. Rogers, 201 Conn. 806 (1987).

REASONS FOR DENIAL OF THE WRIT

THE PETITION FAILS TO DEMONSTRATE ANY CONFLICT BETWEEN THE CONNECTICUT APPELLATE COURT'S DECISION AND THE CONTROLLING PRECEDENTS OF THIS COURT

The petitioner's claim is premised on the assumption that in Doyle v. Ohio, 426 U.S. 610 (1976), this Court established a complete ban on inquiry at trial into a defendant's postarrest silence in the exercise of his Miranda rights. The respondent submits that this premise is erroneous, thus providing an inadequate basis for the writ of certiorari.

In Miranda v. Arizona, 384 U.S.436 (1966), this Court stated the general rule that

> it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interroga-

> tion. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.

384 U.S. at 468 n. 37. In Doyle V. Ohio, supra, this Court stated:

> [S]ilence in the wake of [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights... it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

426 U.S. at 617-18. The Court expressly stated, however, that this prohibitive rule did not apply in all cases:

> It goes without saying that the fact of post-arrest silence could be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather

> to challenge the defendant's testimony as to his behavior following arrest. (citation omitted)

Id. at 619-20 n. 11.

Other courts have subsequently held that in certain situations, references to a defendant's invocation of Miranda rights are not always constitutionally impermissible, or may be harmless error. See, e.g., United States V. Morales-Quinones, 812 F.2d 604 (10th Cir. 1987)(no error where reference brief, not elicited by prosecutor nor used to infer guilt, and not likely that jury would necessarily take it as comment on silence); United States v. Kimberlin, 805 F.2d 210 (7th Cir. 1986) (error harmless where testimony did not focus on specific accusations to which defendant remained silent, and defendant subsequently talked to FBI agents);

United States v. Harrold, 796 F.2d 1275 (10th Cir. 1986) (use of postarrest silence for impeachment purposes harmless where theory of defense patently frivolous and postarrest silence not highlighted); United States v. Makhlouta, 790 F.2d 1400 (9th Cir. 1986) (no error in prosecutor's inquiry into omission from postarrest statement of explanation offered at trial); Hockenbury v. Sowders, 718 F.2d 155 (6th Cir. 1983), cert. denied, 466 U.S. 975 (1984) (prosecutor's comments on omission of significant facts from postarrest statement not designed to draw meaning from silence and pertinent to defendant's trial testimony); United States v. Collins, 652 F.2d 735 (9th Cir. 1981) (references to invocation of rights "mere recitation" of sequence of

events; no error); United States v. Mavrick, 601 F.2d 921 (7th Cir. 1979) (prosecutor correcting inaccurate impression created by defendant's direct testimony); United States v. Agee, 597 F.2d 350 (3d Cir. 1979) (defendant not silent after receiving Miranda warning; inquiry about his attempt to deceive police with false statements not improper); Bradford v. Stone, 594 F.2d 1294 (9th Cir.1979) (prosecutor's references to defendant's postarrest silence harmless where defense counsel did not object to first reference and later pursued the subject himself in closing argument); United States v. Whitaker, 592 F.2d 826 (5th Cir, 1979), cert. denied, 444 U.S. 950 (1980) (prosecutor inadvertently elicited testimony regarding defendant's postar-

rest silence and did not focus it); United States v. Williams, 556 F.2d 65 (D.C. Cir.), (denial of petition for rehearing), cert. denied, 431 U.S. 972 (1977) (not error for witness recounting defendant's postarrest statement to indicate that defendant terminated the statement, else jury might erroneously infer that police failed to give him full opportunity to give his account; any error in testimony about request for counsel harmless); United States v. Sklaroff, 552 F.2d 1156 (5th Cir. 1977), cert. denied, 434 U.S. 1009 (1978) (reference harmless when witness's comments were spontaneous, defendant's silence did not impeach exculpatory story and trial court instructed jury to disregard comments); State v. Casey, 201 Conn. 174, 513 A.2d 1183 (1986)

(introduction of testimony permissible to show sequence of events as they unfolded; Doyle not applicable because defendant did not remain silent after arrest); Hairston v. United States, 496 A.2d 1097 (D.C.App. 1985) (error harmless where prosecutor did not deliberately elicit testimony of defendant's request for counsel and evidence of guilt was strong); State v. Robinson, 620 P.2d 703 (Ariz. App 1980), cert. denied, 450 U.S. 1044 (1981) (testimony that defendant terminated postarrest statement admissable to place statement in context); People v. Martinez, 408 N.E.2d 358 (Ill. App. 1980) (Introduction of evidence that defendant invoked rights to terminate postarrest statement not a Doyle violation); Parks v. State, 543 S.W.2d

855 (Tenn. App. 1976) (where defendant did not remain silent but made postarrest statement, officer's testimony on poststatement invocation of rights not prejudicial, but merely a comment on scope of the statement).

The petitioner relies on the Doyle principle as barring the initial testimony of Lieutenant Graham which set forth the circumstances in which the postarrest interview was terminated. The petitioner wholly failed to object to this or to any of the testimony he now characterizes as constitutionally offensive. While the failure to object does not deprive this Court of jurisdiction since the Connecticut Appellate Court reviewed petitioner's claim on the merits under an exception to Connecticut's contemporaneous objection rule,

Harlin v. Missouri, 439 U.S. 459, 459 (1979); the absence of any objection does indicate that at trial the petitioner acquiesced in the testimony about postarrest events, or at least regarded it as inconsequential. Moreover, as the Appellate Court's opinion demonstrates, the Doyle principle is not applicable here, where the prosecutor never suggested that the invocation of rights was inconsistent with the defense theory, or that it was evidence of petitioner's guilt, but simply elicited it as part of the narrative account of the postarrest interview. See Hockenbury v. Sowders, supra; United states v. Collins, supra; United States v. Williams, supra; State v. Casey, supra; State v. Robinson, supra; Parks v.

State, supra.1

Even if admission of the challenged testimony could be construed as a Doyle violation, it is subject to harmless error analysis. United States v. Kimberlin, supra; United states v. Makhlouta, supra; United States v. Sklaroff, supra. In its brief to the Connecticut Appellate Court, the respondent raised harmless error as grounds for affirming the conviction. See Respondent's Appendix Because the Appellate Court found the doyle prin-

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1 The petitioner cites Wainwright v. Greenfield, __U.S.__, 106 S.Ct. 634 (1986) in support of his petition. Greenfield is factually inapposite to the instant case. In Greenfield, the defendant's invocation of his Miranda rights was offered as evidence of his sanity, a contested issue in the case. By contrast, the Appellate court in the instant case expressly found that the challenged testimony was not prejudicial to the defense and was not offered to prove guilt. (Pet.App. A at 22a-23a)

ciple inapplicable to the facts of this case, it never reached the harmlessness question. But the petitioner's failure to explain the nature of the victim's upset condition could have had only a slight effect, if any, on his own credibility, and no effect on establishing his guilt. The petitioner therefore asks this Court to grant certiorari in order to consider an issue which may ultimately be found to be harmless error. Such a use of this Court's precious resources is inappropriate. See United States v. Johnston, 268 U.S. 220, 227 (1925) (this Court does "not grant a certiorari to review evidence and discuss specific facts").

The petitioner also challenges the cross-examination and rebuttal testimony which followed his direct testimony

about the circumstances of his postarrest interview. As noted, the petitioner never objected to any of the challenged testimony. Indeed, the Connecticut Appellate Court expressly found the petitioner's failure to object was not due to inadvertence or mistake, but was a tactical decision to utilize evidence of the invocation of his rights to his own benefit. (Pet. A App. at 23a). See United States v. Mavrick, supra; Bradford v. Stone, supra. By his own direct testimony, the petitioner put in issue the circumstances of his postarrest interview, particularly the voluntariness of his statements. See Statement of the Case, supra. On cross-examination the prosecutor was certainly entitled to attempt to discredit the defendant's

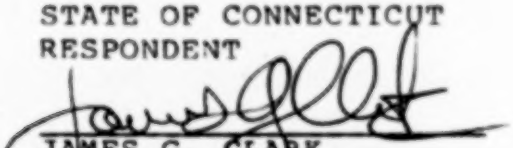
version of postarrest events. Doyle v. Ohio, supra, 426 U.S. at n. 11; United States v. Mavrick, supra, 601 F.2d at 932-33; United States v. Agee, supra, 597 F.2d at 353 n. 5. Moreover, the prosecutor never attempted to elicit from petitioner why he invoked his rights, nor did he focus on any material facts omitted from the postarrest statements. The prosecutor simply challenged the petitioner's direct testimony as to when he exercised his rights. In these circumstances the challenged cross-examination and rebuttal testimony violated no constitutional right. (Pet. App. A at 23a) Therefore the petitioner's claim is meritless.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

STATE OF CONNECTICUT
RESPONDENT

BY: 

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APPENDIX

EXCERPT FROM STATE'S BRIEF TO THE CONNECTICUT APPELLATE COURT

C. If The Doyle Principle Applies, Any Error Was Harmless

Because the cross-examination of the defendant and the rebuttal testimony occurred after the defendant had opened the door to further exploration of the claimed Miranda violation, this Court should only consider whether the initial references to the defendant's exercise of his rights, made by Lieutenant Graham during the state's case-in-chief, were reversible error. The State submits that they were not.

"The applicability of the rule enunciated in Doyle. . .requires case-by-case application and permits a finding of harmless error." State v. Zeko, 177 Conn. at 554. Where the reference to the defendant's invocation

of his Miranda rights is not emphasized or linked with the defendant's exculpatory story and that story is weak in the face of strong evidence of guilt, the reference may constitute harmless error. State v. Pellegrino, 194 Conn. 279, 292, 480 A.2d 537 (1984). This criteria is satisfied here.

In the first instance, it is important to not that the prosecutor did not solicit this testimony, but rather, Lieutenant Graham spontaneously offered it while describing the scope and content of his interview with the defendant. In this situation, the State did not improperly elicit, introduce or emphasize the evidence of the defendant's invocation of his rights, and any error may be deemed harmless. United States v. Whitaker, 592 F.2d 826 (5th

Cir. 1979); United States v. Williams, 556 F.2d 65, 66 (D.C. Cir.), cert. denied, 431 U.S. 972 (1977); Hairston v. United States, 497 A.2d 1097, 1103-4 (D.C. App. 1985).

Second, the context of the reference is important. The emphasis of Lieutenant Graham's testimony was on the defendant's postarrest statements, not his subsequent silence.

> If the defendant makes an admissable statement, the recounting witness may conclude the account in a natural fashion by indicating that there is nothing more to say, because the defendant chose to stop. Otherwise, the jury, may erroneously infer that it was the police who cut the interview short, before the defendant had full opportunity to give his account.

United States v. Williams, 556 F.2d at 67; Parks v. State, 543 S.W.2d 855, 857 (Tenn. App. 1976); State v. Moye, supra.

While it is generally impermissible to introduce evidence of a defendant's postarrest request for counsel to show consciousness of guilt, United States v. Williams, supra; introduction of such evidence may constitute harmless error. Id.1

The initial reference to the defendant's request for counsel was not intentionally elicited by the prosecutor and was not utilized to show conscious-

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1 Although the defendant cites to Zemina v. Solem, 573 F.2d 1027 (8th Cir. 1978), a case involving a violation of the Sixth Amendment right to counsel, the defendant does not present a sixth amendment claim. The only issue briefed by the defendant is the claimed violation of his Miranda rights, to remain silent and to have the assistance of counsel to protect him in his dealings with the police. Thus it is the defendant's right to counsel under the fifth and fourteenth amendments which is at issue here. See State v. Barrett, 197 Conn. 50, 56, 495 A.2d 1044 (1985).

ness of guilt.2 Prior to making the reference, Lieutenant Graham had testified without objection that he had given the defendant the Miranda warnings:

> [Lieutenant Graham]: I told him that he had a right to remain silent and anything he said can and would be used against him in Court. That he had a right to an attorney and if he could not afford one, one would be provided for him at his request. That if he agreed to answer questions, he could stop answering at any time. And, also that if he agreed to answer questions, he could stop and request an attorney be present for any additional questioning.

T. I at 253. (Emphasis added).

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2 It is evident from the transcript quoted herein that the state did not utilize the defendant's request for an attorney as evidence of his guilt at trial. In the absence of a transcript of closing argument or objections thereto, if any, it must be presumed that the state did not unfairly or improperly utilize the evidence in closing argument.

The jury therefore knew that the defendant had been arrested and informed of his rights, and could have viewed the defendant's eventual invocation of his rights as an indication of his growing awareness of his legal predicament. Indeed, it is reasonable, in light of the jury verdict, to presume this view; the defendant was acquitted of burglary and unlawful restraint, two of the three charges arising from the same transaction as the sexual assault for which he was convicted. The jury should not be presumed to have inferred the defendant's guilt from the testimony that he invoked his rights, because the jury was able to evaluate the evidence as a whole, finding it sufficient on only one of the charges. Therefore any error in the reference to the defendant's

invocation of his Miranda rights was harmless beyond a reasonable doubt. See Schedule v. Florida, 405 U.S. 427, 431 (1972); State v. Leecan, 198 Conn. at 533.